current Federal law already provides authority for the punishment of criminals that harm fetuses.

Mr. Speaker, I include for the RECORD the statement from Ronald Weich, a former Special Counsel, U.S. Sentencing Commission, that goes into further detail.

TESTIMONY OF RONALD WEICH, ZUCKERMAN SPAEDER, L.L.P., FORMER SPECIAL COUNSEL, U.S. SENTENCING COMMISSION, BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE HOUSE COMMITTEE ON THE JUDICIARY, MARCH 15, 2001

Mr. Chairman and members of the Subcommittee: My name is Ronald Weich and I am a partner in the law firm of Zuckerman Spaeder LLP. I respectfully request that this written statement appear in the record of the Subcommittee's hearing on H.R. 503, the Unborn Victims of Violence Act of 2001.[1]

In this statement I analyze the criminal law and sentencing implications of the pending bill. I bring several qualifications to this task. From 1983 to 1987 I worked as an Assistant District Attorney in New York City, where I prosecuted a wide array of criminal cases. Thereafter I served as Special Counsel to the United States Sentencing Commission and participated in drafting amendments to the federal sentencing guidelines. I then served on the staff of several Senate committees where I assisted in the development of federal crime and sentencing policy. I am now in private practice, but I continue to serve on the advisory board of the Federal Sentencing Reporter, a scholarly journal in which I have frequently published articles on sentencing law and policy. I am also a member of the Criminal Justice Council of the American Bar Association.[2]

After reviewing H.R. 503 in light of my experience in the criminal justice system, my knowledge of the federal sentencing guidelines and an examination of relevant case law, I reach one basic conclusion: this bill is unnecessary. Current federal law provides ample authority for the punishment of criminals who hurt fetuses. H.R. 503 adds nothing meaningful to the charging arsenal of federal prosecutors or the sentencing options available to federal judges.

Because the bill is unnecessary from a criminal law perspective, I suspect that its purpose, instead, is to score rhetorical points in the perennial struggle over abortion rights. For reasons that I will explain, I object to the use of the federal criminal code as a battlefield in the abortion wars.

I will first describe why the bill is unnecessary in light of current federal law and then explain why I believe it is an unwise addition to federal law.

I. H.R. 503 IS UNNECESSARY

Current federal law already provides sufficient authority to punish the conduct that H.R. 503 purports to punish.

At the outset it should be understood that very few violent crimes are prosecuted in the federal courts. Most street level violent crimes are prosecuted under state law by state prosecutors in state courts. Under our constitutional system, federal criminal jurisdiction only exists if the crime implicates federal civil rights or interstate commerce—which few violent crimes do—or if the crime occurs on a federal enclave such as a federal office building, a military base or an Indian reservation. Thus there are only a handful of federal murder and assault prosecutions each year, and most of those involve Native Americans.

H.R. 503 targets relatively rare conduct to begin with, namely criminal assault on a fetus. And in the federal context, that rare conduct is even more unusual. I researched federal case law and found only one reported case in recent years in which the victim of the offense of conviction was a fetus. In that case, *U.S.* v. *Spencer*, 839 F.2d 1341 (9th Cir. 1988), the Native American defendant assaulted a pregnant woman on an Indian reservation, kicking and stabbing her in the abdomen. The woman was successfully treated for life-threatening injuries, but her fetus was born alive and then died. The Ninth Circuit upheld the defendant's conviction under the federal murder statute, 18 U.S.C. §1111. Thus, even without the help of H.R. 503, a federal defendant was successfully prosecuted for murdering a fetus.

The Spencer decision is significant for several reasons. First, it illustrates how rare such cases are in the federal system—the court refers to the issue of federal criminal liability for fetal death as one of ''first impression'' and in the 13 years since it was decided, the issue decided in Spencer appears not to have arisen in another reported federal case. There is no crime wave of federal fetal assaults crying out for a legislative solution. But should this rare scenario present itself in federal court again, Spencer stands for the proposition that criminal liability may be imposed under current federal law.

The Spencer court relies on the well established common law doctrine, developed in state courts, that fetal death subsequent to birth due to fetal injuries may be prosecuted as homicide. See, Annotation, Homicide Based on Killing of Unborn Child, 64 A.L.R. 5th 671 (1998). Among the many state cases upholding homicide convictions for assaults that resulted in the death of a fetus are *William* v. *State*, 561 A.2d 216 (Maryland 1989); *State* v. *Cornelius*, 448 N.W.2d 434 (Wisconsin 1989); *People* v. *Hall*, 158 A.D.2D 69 (New York App. Div. 1st Dept. 1990); and *State* v. *Cotton*, 5 P.3d918 (Arizona 2000).

The broad support for this rule in the state courts does not argue for its necessity in the federal code, since state law of this nature is incorporated into federal law by the Assimilative Crimes Act, 18 U.S.C. §13, when the crime occurs in a federal enclave such as a military base. That was the basis on which the Court of Appeals for the Armed Forces recently upheld the homicide conviction of Gregory Robbins for beating his wife and thereby causing the termination of her pregnancy. *U.S.* v. *Robbins*, 52 M.J. 159 (1999). Proponents of the Unborn Victims of Violence Act had argued in 1999 that the Robbins case, then pending, demonstrated the need for a new federal law, but the successful outcome of the prosecution shows precisely the opposite: current federal law is sufficient.

Analytically separate from the question of criminal liability is the question of punishment. Here again, current federal law is sufficient. There is no dispute that causing harm to a fetus during the commission of a federal felony should generally result in enhanced punishment, and courts have uniformly held that such enhancements are available under the current sentencing guidelines. For example, in both *U.S.* v. *Peoples*, 1997 U.S. App. LEXIS 27067 (9th Cir. 1997) and *U.S.* v. *Winzer*, 1998 U.S. App. LEXIS 29640 (9th Cir. 1998), the court held that assaulting a pregnant woman during a bank robbery could lead to a two level enhancement (approximately a 25% increase) under §2B1.1(b)(3)(A) of the Guidelines relating to physical injury. In *U.S.* v. *James*, 139 F.3d 709 (9th Cir. 1998), the court held that a pregnant woman may be treated as a ''vulnerable victim'' under §3A1.1 of the Guidelines, again leading to a two level sentencing enhancement for the defendant. And in *United States* v. *Manuel*, 1993 U.S. App. LEXIS 14946 (9th Cir. 1993), the court held that the defendant's prior conviction for assaulting his pregnant wife warranted an upward departure from the applicable guideline range for his subsequent assault conviction.

While there have been no federal death penalty prosecutions of civilians in recent years involving fetal assaults, the military justice system treats the murder victim's pregnancy as an aggravating factor to be considered during the capital sentencing phase of a trial. *United States* v. *Thomas*, 43 M.J. 550 (U.S. Navy-Marine Corps Ct. of Crim. App. 1995). This holding follows state law precedents in which the pregnancy of the victim is a statutory aggravator in capital cases. See, e.g., Del. Code Ann. Tit. 11, §4209(e)(1)(p) (Supp. 1986).

In sum, H.R. 503 is unnecessary because federal case law and the federal sentencing guidelines, building on well-established common law principles, already authorize serious punishment for the harm that the bill seeks to address.

II. H.R. 503 IS DETRIMENTAL TO THE CRIMINAL JUSTICE SYSTEM

To say that H.R. 503 is unnecessary does not end the inquiry. As members of the Judiciary Committee are aware, the federal criminal code is characterized by much redundancy, and one more criminal law prohibiting what is elsewhere prohibited would barely add to the thicket. But for three reasons, H.R. 503 would not only constitute an unnecessary addition to the Code, it would also be an undesirable addition.

First, the bill has been drafted in a structurally unsound manner and will lead to considerable confusion and litigation. To be convicted under 18 U.S.C. §1841, the new criminal offense created by H.R. 503, a defendant must have ''engage[d] in conduct that violates'' one of the existing federal crimes enumerated in §1841(b). But must the defendant be convicted of one of those other offenses before he may be convicted of the separate offense under §1841? That is a fair reading of the text, but the answer is not without doubt. There is already considerable controversy and resource-draining litigation in the federal courts over whether various title 18 provisions constitute separate offenses requiring proof beyond a reasonable doubt or sentencing enhancements requiring only proof by a preponderance of evidence, see, e.g. *Appendix* v. *New Jersey*, 530 U.S. 466 (2000); *Jones* v. *United States*, 119 S. Ct. 1215 (1999). H.R. 503 would add to this confusion if there were ever a prosecution under the new criminal provision it establishes.

This problem could be addressed if, instead of creating a new criminal offense, H.R. 503 merely directed the Sentencing Commission to either establish a new sentencing enhancement when the victim of the crime is a pregnant woman, or make clear that a pregnant woman may be considered a ''vulnerable victim'' under existing §3A1.1 of the Sentencing Guidelines. As demonstrated above, the generic provisions of the Guidelines already accomplish this result. But at least a sentencing enhancement bill would not foster confusion and litigation.

Second, H.R. 503 is overbroad. To begin with, it incorporates by reference an unduly broad definition of ''bodily injury'' from 18 U.S.C. §1365. Whereas the common law rule applied to termination of the pregnancy, H.R. 503 would make it a violation of federal law to cause ''physical pain'' to the fetus or ''any other injury to the [fetus], no matter how temporary.'' 18 U.S.C. §1365(g)(4). That definition may make sense in the consumer safety context from which it derives, but it is bizarre and extreme in the prenatal context of H.R. 503. Further, H.R. 503 applies to all fetuses, not merely those that are viable, and explicitly applies to unintentional as well as intentional conduct. The common law rule, evolved over centuries of Anglo-